APPENDIX

IN THE SUPREME COURT OF NEW NERSEY, WAYNE C. POMANOWSKI, PLAINTIFF-RESPONDENT, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION, AND MONMOUTH COUNTY MULTIPLE LISTING SERVICE, DEFENDANTS-APPELLANTS, AND NEW JERSEY ASSOCIATION OF REALTORS, NATIONAL ASSOCIATION OF REALTORS, WILLIAM G. KIRCHER, AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERED BY CLIFFORD, J.

Defendant Monmouth County Board of Realtors (MCBR or the Board) is a trade association affiliated with defendants New Jersey Association of Realtors and National Association of Realtors (R)[1]. MCBR makes available to its members the Monmouth County Multiple Listing Service (MCMLS), which operates as a committee of the Board. A by-law of the MCBR requires that as a precondition to access to MCMLS, a real estate broker be a member of the Board. The principal issue is whether

[1] The term "Realtor" is a registered mark of the National Association of Realtors, used to refer only to members of the Realtor trade association. The National Association licenses state and local Boards to use this mark.

that arrangement constitutes a violation of the New Jersey Antitrust Act, N.J.S.A. 56:9-1 to -19, as held by the court below, Pomanowski v. Monmouth County Board of Realtors, 175 N.J. Super. 212 (Ch. Div. 1980). We hold to the contrary and hence reverse.

I

Plaintiff, Wayne Pomanowski, a licensed real estate broker, operates the Thompson Agency in Tinton Falls, Monmouth County. From 1972 until 1977 plaintiff was a member of both MCBR and MCMLS and had access to the multiple listing service as a member of the Board. In April 1977 plaintiff terminated his membership in the Board by not paying dues for himself and his salespeople. He was thereupon denied participation in MCMLS.[2]

Shortly thereafter, plaintiff commenced this suit against MCBR; MCMLS; the National

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[2] Although plaintiff stopped paying his MCMLS dues as well, defendants concede that failure to pay MCBR dues would alone have precluded his participation in MCMLS. By the terms of a consent order signed June 24, 1977, plaintiff has been permitted to pay his MCBR dues in escrow and to participate in MCMLS until conclusion of the case.

Association of Realtors; William G. Kircher, executive officer of MCBR; and Charles Darrah, president of MCBR. By amended complaint plaintiff elleged that in conditioning participation in MCMLS on membership in MCBR, defendants had restrained trade and conspired to restrain and monopolize trade in violation of N.J.S.A. 56:9-3 and-4 (the monopoly theory was not pursued). Plaintiff sought injunctive relief under N.J.S.A. 56:9-10 and treble damages under N.J.S.A. 56:9-12 (the claim for damages was later waived).

On defendants' motion for summary judgment, the trail court entered judgment in favor of plaintiff pursuant to R. 4:67-5, declaring the limitation of participation in the multiple listing service to members of MCBR an unlawful restraint of trade. Pomanowski v. Monmouth County Board of Realtors, 152 N.J. Super. 100, 109 (Ch. Div. 1977). The court recognized that alleged anticompetitive activity is generally analyzed under one of two standards: either it is condemned automatically as a per se violation of the antitrust law, or it is evaluated to determine whether it in fact causes sig-

nificant harm relative to the business justification. The latter test -- the rule of reason -- is applied where restrictive conduct is not "manifestly anticompetitive," so that searching inquiry into both the degree of harm and the proferred business rationale is warranted. Continental T.V. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L.Ed. 2d 568, 580 (1977). Adopting this "rule of reason" analysis, the court found that because Board membership is "totally unrelated" to the operation of the multiple listing service, there existed no bona fide justification for restricting multiple listing service access to Board members only. 152 N.J. Super. at 108. Both MCBR and MCMLS were enjoined from denying nonembers equal access to the multiple listing service. Inasmuch as the declaratory and injunctive remedy afforded plaintiff complete relief, the court entered judgment in favor of the other named defendants. Id. at 109.

On the appeal of MCBR and MCMLS the Appellate Division agreed that the "rule of reason" analysis was appropriate; it concluded that since membership in the MCBR

was available on payment of dues to all New Jersey real estate brokers, and since plaintiff had been a member but had resigned voluntarily, the membership requirement was not "manifestly anticompetitive." Pomanowski v. Monmouth County Board of Realtors, 166 N.J.Super. 269, 271-72 (1979). However, inasmuch as the "rule of reason" analysis normally requires "'an ascertainment of the facts peculiar to the particular business,'" id. at 274, quoting White Motor Co. v. United States, 372 U.S. 253, 261, 83 S. Ct. 696, 700, 9 L.Ed. 2d 738, 745 (1963), and because the trial court's conclusions were based upon an inadequate factual basis, the Appellate Division remanded the case for a plenary hearing, on the basis of which the trial court was to "construct (its) determination with the bricks and mortar of detailed findings of fact and conclusions of law." 166 N.J. Super. at 274. We denied certification, 81 N.J. 260 (1978).

On remand plaintiff sought to establish that MCMLS controlled the real estate market in Monmoth County, so that an individual broker's participation in the service was essential to his continued

ability to compete. Plaintiff argued that far from being a mere service to members of MCBR, the MCMLS was a practical economic necessity to small brokers like himself. Finally, he contended that there was no adequate business justification for conditioning access to MCMLS on Board membership.

Defendants urged that the MCMLS share of the real estate market was far smaller than plaintiff alleged, and that in any event, restricting MCMLS access to Board members was reasonable. They argued that inasmuch as membership in the Board is open to all licensed brokers, and since neither the Board dues nor MCMLS fees are exorbitant, a requirement of Board membership has no anticompetitive effect. As additional support for their position they emphasized the linking of MCBR to MCMLS as evidenced by the many hours of volunteer services, arbitration and grievance functions, and educational benefits supplied by Board members to MCMLS.

After a hearing in which both the Attorney General, on behalf of the Antitrust Section of the Division of Criminal Justice, and the

National Association of Realtors participated as amici curiae, the trail court entered judgment for plaintiff. It determined that through MCMLS, the MCBR controlled at least 50% of the residential real estate business of Monmouth County. 175 N.J. Super. at 216. The asserted advantageous nexus between the MCBR and the MCMLS in the form of volunteer activities was not considered sufficiently important to outweigh the anticompetitive effect of the non-access fule. Id. at 218-19. Therefore the court enjoined MCBR from requiring membership in the Board as a precondition to participation in the MCMLS. In addition it awarded attorney's fees and costs of suit to plaintiff.

On this appeal on grant of direct certification, 87 N.J. 426 (1981), defendants claim that the trial court erred, both in its analysis of the defendants' market share and in its determination that membership in MCBR posed an unreasonable condition on access to the MCMLS. They contend that controlling weight must be given to federal case law, and that federal cases raising the question at issue here have all been decided in their favor. In

addition, defendants have moved to suppress the brief and appendix of the amicus curiae Attorney General. Decision on that motion was reserved until disposition of the appeal.

II

(1) This court recently recognized certain aides in the determination of the antitrust implications of arragements such as that structured by the MCBR-MCMLS, in the light of our relatively new Antitrust Act, N.J.S.A. 58:9-1 to -19.

> (C)onsonance between the federal and state enactments is required. Courts in assessing state antitrust acts patterned after the federal Sherman Act, as is the New Jersey act, have concluded that federal court interpretations of federal law constitute persuasive authority as to the meaning of the particular state enactments. Moreover, the New Jersey act is to be construed "in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it. N.JS.A. 56:0-18" (State v. Lawn King, 84 N.J. 179, 192 (1980) (citations omitted).)

Accordingly, we are required to follow "ruling judicial interpretations" on the issue before us. As to precisely that issue, however, the United States Supreme Court has rendered no decision directly on

point.[3] Nevertheless, the federal cases are useful in developing an analytical framework in which to address the restraint-of-trade question, as are other state court

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[3] Defendants invite our attention to several federal district court decisions that seem to be apposite: Brown v. Indianapolis Board of Realtors, 1977-1 Trade Reg. Rep. (CCH) 61,435 (S.D. Ind. 1977) (no antitrust violation where broker denied membership to Board of Realtors, based on failure to show "favorable business reputation in the community"); Martin-Trigona v. National Association of Realtors, 1978-1 Trade Reg. Rep. 61,915 (E.D. Ill. 1978) (memorandum opinion relying on Brown, supra, for proposition that Realtor Board, as a voluntary trade association, may properly exclude any nonmember from participation in its varied activities); Murphy v. Alpha Realty, Inc., 1978-2 Trade Reg. Rep. (CCH) 62,388 (N.D.Ill. 1978) (relying on Brown supra, for proposition that Board membership is acceptable limitation on multiple listing service participation); Colorado ex rel. MacFarlane v. Colorado Springs Board of Realtors, 1980-81 Trade Reg. Rep. 63,653 (Dist.Ct.Col. 1980) (only membership requirements necessary to efficient operation of multiple listing service permissible, where Realtor Board and multiple listing service considered single identity). Because these trial court opinions treat the multiple-listing-access-question in a cursory manner, they lack persuasive force and amount to no more than a respected source of instruction. Cf. Clairol Inc. V. Cosmetics Plus, 130 N.J. Super. 81, 94-101 (Ch. Div. 1974) (containing painstaking analysis of pertinent authorities).

decisions construing state antitrust acts in accordance with federal court interpretations of the Sherman Act. See N.J.S.A. 56:9-18.

III

The courts below judged the conduct of MCBR and MCMLS under a "rule of reason" standard, see supra at 311-12. In that connection it bears emphasis that MCBR membership is available to all on precisely the same terms: the securing of a valid real estate broker's license and the payment of MCBR dues and an MCMLS initiation fee.[4] Significant too is the fact that plaintiff had been a member of both MCBR and MCMLS for five years and then voluntarily resigned.

The subject of the considerations that dictate application of the "rule of reason" rather than the "per se" rule might in other circumstances warrant extended treatment, but the concise discussions of that

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[4] Every broker-member of MCBR is required to pay annual dues of $170 $125 when plaintiff quit the Board), plus a $40 fee for each salesperson in his employ. Each Realtor who elects to participate additionally in MCMLS is required to pay an initiation fee of $250, in addition to monthly fees of $25 and $15 for employed brokers and salespeople respectively.

provocative issue by the courts below suffice for today's purposes. See 152 N.J. Super. at 105-07, 166 N.J. Super. at 271-73. Particularly is this so in view of the parties' agreement that the "rule of reason" provides the appropriate framework of analysis for this case.

(2-4) Although we do not agree in all respects with its rulings on and analysis of the evidence, the trial court used the appropriate methodology in applying the rule. As first framed in Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L.Ed. 619 (1911), the "rule of reason" requires the court to weigh all the circumstances of a given case to determine whether the disputed practice constitutes an "unreasonable restraint on competition." State v. Lawn King, Inc., supra, 84 N.J. at 194. See also Continental T.V., Inc. v. G.T.E. Sylvania, Inc., supra, 433 U.S. at 49, 97 S.Ct. at 2557, 53 L.Ed.2d at 580. The court must subject the challenged restraint's impact on competitive conditions to probing examination. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362,(5th Cir. 1980). See also National Society of Professional Engineers v. United

States, 435 U.S. 679, 688, 98 S. Ct. 1355, 1363 55 L.Ed.2d 637, 648 (1978). The rule envisions a balancing process that scrutinizes the competitive significance of a given practice: if the probompetitive benefits of that practice exceed any anticompetitive effects, the restraint will pass muster under the Sherman Act, 15 U.S.C. 1, and likewise under N.J.S.A. 56:9-3. See Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 243, 62 L. Ed. 683, 687 (1918). This balancing process calls for two steps: first, a definition of the relevant market or markets in which the questioned restraint operates; and second, an evaluation of the "evils" inherent in the challenged practice and a weighing of those anticompetitive influences against any procompetitive justifications.

(5) For the purposes of this case, the pertinent markets are the relevant geographic and product markets. In respect of the former, the trial court correctly found Monmouth County to be the appropriate geographic market. 175 N.J. Super. 215-16. As to the relevant product market the trial court limited its analysis to a determination

of defendants' control over residential real estate in Monmouth County, excluding commercial property, farms and vacant property. 175 N.J. Super. at 216. See also United States v. Realty Multi-List, Inc., supra, 629 F.2d at 1372; Marin County Board of Realtors v. Palsson, 16 Cal.3d 920, 936, 549 P.2d 833,842,130 Cal. Rptr. 1, 10 (1976). This too was the correct approach. The evidence established that the overwhelming number of MCMLS listings are residential (defendants' own Confidential Activity Report for 1978-79 showed that 90% of all listing processed by MCMLS were residential property), and plaintiff's assertion that he dealt almost exclusively with the sale of residential property was undisputed.

The next step in applying the "rule of reason" requires examination of defendants' impact upon those markets, a point on which the record is less than clear. To evaluate that impact, the trial court looked to (1) the defendants' share of residential real estate sales in Monmouth County, and (2) the number of active Monmouth County real estate brokers participating in MCMLS.

As to the former, in the absence of any readily accessible real estate sales data source, both the plaintiff and the defendants relied on the Monmouth County tax records for the 1977 calendar year. Their review of these records produced different conclusions regarding defendants' total share of residential real estate sales: plaintiff arrived at a figure of approximately 50%, whereas defendants believed their share amounted to only 27%. The variance in these figures is not surprising, given the degree of speculation that afflicts the parties' calculations.[5] Moreover, the trial court's determination of the number of active Monmouth County real estate brokers participating in MCMLS was tainted by the demonstrable unreliability of its source: a Yellow Pages telephone book survey produced by the Antitrust Section of the

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[5] For instance, the Monmouth County tax records proved to be a doubtful source of relevant information because of the failure of those records to indicate whether a given transfer was effected through the services of a real estate broker. Consequently, although the parties could determine the dollar value of residential sales in the MCBR-chartered jurisdictional territory in 1977, they could only guess at the proportion of those sales that involved real estate brokers.

Division of Criminal Justice.[6]

(6) Accordingly, we can have little confidence that the figures presented as true indicators of defendants' market impact are reliable. Indeed, the sharp disparity in the stated percentages alone raises questions as to their accuracy. However, when these

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[6] The Yellow Pages survey sought to compare the total number of active real estate brokers in the MCBR-chartered jurisdictional territory with the number of brokers actually participating in the MCMLS. In order to arrive at the latter figure the Antitrust Section compared Red Bank-area Yellow Pages advertisers specifying that they were MCMLS participators with the MCBR membership roster. When a name appeared on both "lists", the broker was assumed to have been a member of the MCMLS, as opposed to another multiple listing service. Those Yellow Pages advertisers who concentrated on property sales other than residential real estate were excluded from the survey (the Antitrust Section offered no explanation, however, as to why condominium sellers were excluded). Because there are three Monmouth County telephone books (Red Bank, Asbury Park, and Freehold), advertisers may choose to advertise in any one or more of the Yellow Pages books. It follows then that in limiting the survey to the Red Bank Yellow Pages, the Antitrust Section may have artificially reduced its final tally of Monmouth County real estate brokers. Moreover, the entire survey rests upon the dubious assumption that all real estate brokers located in the MCBR-chartered jurisdictional territory advertise in the Red Bank Yellow Pages.

"empirical" assessments are coupled with defendants' stipulation that they were instrumental in over 25% to 29% of all real estate sales for the fiscal years 1977-78 and 1978-79, we can reasonably infer that the defendants maintain the requisite market power to warrant our further scrutiny of their conduct under the Antitrust Act.

IV

The foregoing analysis leads us to the heart of the case: a determination of the "reasonableness" of the restraint and particularly its impace on competition. Professional Engineers, supra, 435 U.S. at 688, 98 S. Ct. at 1353, 55 L.Ed.2d at 648.

In Grillo v. Board of Realtors, 91 N.J. Super. 202 (Ch.Div. 1966), the court assessed the competitive significance of the multiple listing service as a real estate marketing technique:

> There is good in the multiple listing system. It provides an effective method for selling and buying properties. The seller benefits because his property is exposed in a number of offices, hence reaches a wider market in a shorter period of time. It is also useful and convenient to the prospective buyer who is seeking a house that will suit his needs and purse. From one selling agent he can learn of many of the properties for sale in the area. In effect, the multiple listing

service operates as an exchange for the sale of real estate. The multiple listing system can potentially stimulate competition in the real estate field by placing listings in the hands of all brokers in the area (id. at 218-19.)

See also Austin, "Real Estate Boards and Multiple Listing Systems as Restraints of Trade," 70 Colum.L.Rev. 1325, 1353-54 (1970).

The procompetitive virtues of a multiple listing service are obvious; it is an ingenious mechanism for reducing the market imperfections inherent in the real estate industry. It operates as a clearing house of sorts in that the purchaser has access to a wide selection of properties and the vendor-broker is exposed to a larger market than could be reached through the unaided efforts of a single seller. At the same time, however, where the service has substantial market power, an excluded broker may be unable to compete effectively, given his limited abilities to find prospective purchasers and offer a range of listings comparable to those held by the service. The individual broker so situated "has only a limited supply of 'shoes on the shelves.'" Oates v. Eastern Bergen County Multiple

Listing Service, Inc., 113 N.J. Super. 371, 382 (Ch.Div.1971) (absolute exclusion of broker by independently-run multiple listing service held violative of Antitrust Act).

Defendants contend that since a trade association is entitled to confine its benefits to members, and since participation in MCMLS is a membership benefit offered by MCBR, there is no antitrust violation in limiting MCMLS access to Board members. Although there are multiple listing services that operate independently of realtor boards, defendants argue that MCMLS is "inextricably interconnected" with MCBR and thereby dependent upon the Board for its success. Further, defendants assert that this "interconnection" enables MCMLS to achieve certain pro-competitive benefits that would be unavailable were the MCMLS independent. First, they point out that MCMLS uses both the National Association of Realtors trademark and the Multiple Listing Service logo. See n.1, supra at 310. These symbols purportedly attract customers by assuring the public of the propriety of the business organization with which they are dealing. Additionally, MCBR promulgates a code of ethics, imposes sanctions upon delinquent members, and provides facilities

for arbitration of disputes and resolution of ethics complaints. These assurances, the argument goes, help to overcome the reluctance of home-sellers to authorize multiple listing service brokers to serve as sub-agents of the listing broker.

Of pivotal importance, however, is the fact that MCMLS shares office space, personnel, and equipment with MCBR. Moreover, MCBR members volunteer hundreds of hours to the operation of MCMLS. As a consequence, defendants contend, Board affiliation provides MCMLS with economies of operation not available to an independent multiple listing service. Defendants argue that because Board members would hardly volunteer time and agree otherwise to subsidize MCMLS if its benefits were available equally to nonmembers of the Board, the effect of severing MCMLS participation from Board membership would be to increase the operating cost of MCMLS. The result would be the erection of a barrier to entry represented by the increased cost of running such a multiple listing service.

In evaluating these contentions, the trial court implicitly assumed that the proper question was whether MCMLS could survive if if functioned independently of MCBR. Thus,

the court pointed to testimony that "demonstracted that an independent MLS can function efficiently although it is not a part of a realtor organization." 175 N.J. Super. at 219[7]. Whatever benefits the Board bestowed on MCMLS could be duplicated, since "an independent MLS would be free to develop its own committees on arbitration,

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[7] Although the trial court relied heavily on the testimony of Harry J. Gerlach, executive officer of the Multiple Listing Service of Northern New Jersey, to establish that multiple listing services do operate without Realtor Board sponsorship, it appeared to ignore the fact that the initiation fee for the Northern New Jersey Multiple Listing Service is $1300 as compared to the $250 fee maintained for the MCMLS. The annual cost of MCBR membership with MCMLS participation for a broker and one salesperson is $690. The annual cost of Northern New Jersey Multiple Listing Service membership for a broker with a single salesperson is $308 plus $25 for each listing submitted. To a firm that handles fifteen listings, then, the cost of the two memberships is roughly equal. An apples-aranges comparison does not, of course, demonstrate that Board-affiliated multiple listing service participation is chéaper. It does suggest that in focusing on whether MCBR benefits could be reproduced outside the organization, the trial court appeared to brush aside the possibility that the cost of such benefits might then be substantially higher. The court appears not to have considered the procompetitive benefits (as opposed to the benefit to MCBR or to MCMLS) that arises from Board sponsorship of MCMLS.

education or affirmative action." Id. Finally, the court noted that it was "simply not convinced that multiple listing in Monmouth County will cease unless it is part of the MCBR." Id.

(7)The appropriate question, however, is not whether MCMLS would be destroyed in the absence of the challenged MCBR membership rule (almost certainly it would not), but rather whether the anticompetitive effects of conditioning MCMLS access on Board membership are outweighed by the pro-competitive gains that flow from Board sponsorship of MCMLS. If that competitive benefit would be lost, and if such loss would outweigh the negative effect of the access rule, then the rule is an acceptable limitation on competition. See Professional Engineers, supra, 435 U.S. at 688, 98 S.Ct. at 1363, 55 L.Ed.2d at 648. In centering its inquiry upon whether MCMLS would survive absent the access rule, the trial court failed to strike the necessary balance.

Moreover, the trial court treated the case as one involving a denial of access; it apparently attached little significance to the fact that plaintiff's withdrawal from the MCMLS was voluntary and that he is free

to rejoin on payment of his MCBR dues. 175 N.J. Super. at 220-21. The question of access to multiple listing services has been dealt with previously in two New Jersey cases, Grillo v. Board of Realtors, supra, and Oates v. Eastern Bergen County Multiple Listing Service, Inc., supra. In both Oates and Grillo, the exclusion was absolute -- in Oates the plaintiff realtor was denied access to the defendant multiple listing service; in Grillo multiple listing service participation was conditioned on Realtor board membership, which was denied to plaintiff. The courts found in Oates a violation of the Antitrust Act and in Grillo a common law restraint of trade. The court in Grillo, however, distinguished that case from one in which access to the multiple listing service, while conditioned on Realtor Board membership, was as a practical matter upen to all. "If every licensed real estate broker in the Plainfield area could become a member of the Board for the asking, no non-member would have cause for complaint about being excluded from the benefits of the multiple listing service." 91 N.J. Super. at 210.

Although a number of courts in other jurisdictions have ruled on the question of

access to a multiple listing service, most cases have arisen in the context either of exclusion from an independent multiple listing service, United States v. Realty Multi-List, supra, (multiple listing service's restrictions on membership held unreasonable restraint on trade); Blake v. H-F Group Multiple Listing Service, 36 Ill. App.3d 730, 345 N.E.2d 19 (App.Ct. 1976) (exclusionary membership requirements of multiple listing service do not violate Antitrust Act absent a deleterious effect on competition); Grempler v. Multiple Listing Bureau, 258 Md. 419, 266 A.2d 1, 45 A.L.R.3d 180 (Ct.App. 1970) (membership requirement of multiple listing service reasonable), or exclusion from Realtor membership where such membership was required for multiple listing service participation, Brown v. Indianapolis Board of Realtors, supra (broker denied membership in board of realtors, based on failure to show "favorable business reputation in the community" -- no antitrust violation); Collins v. Main Line Board of Realtors, 452 Pa. 342, 304 A.2d 493 (Sup. Ct. 1973) (broker denied membership in Board of Realtors; Board ordered either to admit brokers as members or to permit non-

members to participate in multiple listing service).

The few courts that have considered whether multiple listing service participation may be conditioned on realtor board membership absent any exclusionary membership requirement have reached varying results. In Marin County Board of Realtors, Inc. v. Palsson, supra, a realtor board required that applicants for membership be "primarily engaged" in the real estate business, and denied nonmembers access to its multiple listing service. The court held that "(t)he board's rules denying access of nonmembers to the multiple listing service must be eliminated, although nonmembers may be charged a reasonable fee for use of the service consistent with the per-capita costs of operation." 549 P.2d at 845, 130 Cal.Rptr. at 13. The court noted that an association's freedom to exclude nonmembers from its activities is not absolute, and must yield to the antitrust laws when the association has market power and its activities correspond directly with the business activities of its members. Id. at 843, 130 Cal.Rptr. at 11.

The Iowa Supreme Court recently addressed

the question in State v. Cedar Rapids Board of Realtors, 300 N.W.2d 127 (Iowa 1981). There, the Cedar Rapids Board of Realtors had developed a multiple listing service exclusively for Board members. The State filed an action under the Iowa Competition Act, which, like the New Jersey Antitrust Act, is patterned after the Sherman Act. The State claimed that conditioning brokers' access to the multiple listing service on Board membership was an unreasonable restraint on trade. 300 N.W.2d at 129. Relying upon Professional Engineers, supra, the Court framed the crucial inquiry as being "(w"hether a restraint suppresses competition ***", id., not whether the agreement affords the parties thereto an edge over competitors. To this end, the court observed that:

> (t)he State's proposed solution would give a few competitors a monetary advantage over the MLS brokers whose organizing ability, money, and volunteer time has made the service a viable tool for effective selling. Judge Learned Hand's admonition is relevant: "The successful competitor, having been urged to compete, must not be turned upon when he wins." United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945). [Id. at 129-30.]

The court condluded that "so long as Board membership is available to all on a nondiscriminatory basis as this record indicates, we will not compel this private trade association to share one of its membership benefits with brokers who, for whatever personal or business reasons, declined to join." Id. at 131.

Significantly, the Court in Cedar Rapids interpreted the Marin County decision as holding that it was the combination of two Board by-laws -- denial of membership to part-time salesmen and denial of multiple listing service access to non-members -- that unreasonably denied nonmembers access to the multiple listing service. We agree

with that interpretation of Marin County.[8]

(8) Moreover, the reasoning of Cedar Rapids in assessing the competitive significance of the restraint in that case is persuasive. Where there are no exclusionary

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[8] In People v. National Association of Realtors, 120 Cal.App.3d 459, 174 Cal.Rptr. 728 (Ct.App. Cal.1981), a California Court of Appeals spcifically declined to follow the Cedar Rapids court's interpretation of Marin County. Id. 174 Cal.Rptr. at 732. The court struck down as an illegal group boycott a realtor board rule that conditioned multiple listing service access on board membership. It described the Marin County decision as having "analyzed each restriction separately, found each to have anticompetitive effects far outweighing any possible business justification (the Rule of Reason test) and separately disapproved the MLS limitation for access to Board members only." Id. We view that conclusion as erroneous and agree with the Cedar Rapids interpretation that it was the combination of two Board by-laws that amounted to the antitrust violation. The following language from Marin County is particularly significant:

> We emphasize that the question before us concerns the validity of the "primarily engage" rule in conjunction with other board bylaws effec - tively denying employment to nonmember salesmen. [16 Cal.3d at 938 n.13, 549 P.2d at 844 n.13, 130 Cal.Rptr. at 12 n.13 (emphasis added).]

conditions attached to Realtor Board membership, and there is no contention that the cost is prohibitively high, it is difficult to see any affront to competition. Although we agree that MCMLS has a substantial market impact on the residential real estate community in Monmouth County, it does not logically follow that the MCBR membership requirements stifle the free flow of competitive forces in that market. Further, there has been no showing that the elimination of the access rule will effect any procompetitive benefits -- that MCMLS participation will be less expensive or even reamin the same, or that a greater number of brokers will thereby be able to achieve access. Absent any showing of a true denial of access, the defendants should not be required to dismantle or significantly alter a trade association that provides procompetitive benefits in excess of any anticompetitive effects engendered. Accordingly, we conclude that in conditioning MCMLS access on MCBR membership, defendants have created a reasonable restraint of trade -- one not in violation of our Antitrust Act.

V

(9) Defendants' motion for suppression of the brief and appendix of the amicus curiae is directed at the contents of the appendix, particularly the galley proofs of an article that later appeared at 11 Seton Hall L.Rev. 396 (1981). The article was written by the Deputy Attorney General who authored the amicus brief and testified as plaintiff's expert witness at trial. The appendix contains as well a variety of other material, including newspaper and magazine articles, the transcript of a hearing before the New Jersey Real Estate Commission at which the same Deputy Attorney General appeared as a witness, a portion of a brief submitted by the New Jersey Association of Realtors to the United States Supreme Court in an unrelated matter, and a copy of a consent decree likewise filed in another case.

No extended discussion is required to demonstrate the impropriety of the gratuitous inclusion of these materials in the Attorney General's filings. As for the law review article, it contains a statistical analysis of complaints filed against licensed real estate practitioners in New Jersey, which

the trial court had refused to accept into evidence. Although the article as a whole may, as the Attorney General contends, transcend the present case, the fact reamins that in including it in his appendix, the Attorney General has put before the Court evidence directly related to this case that was explicitly excluded by the trial court. The Attorney General argues that the article is "secondary source authority." This contention is just silly. The article is not the product of an independent and disinterested scholar. Its author not only wrote the Attorney General's brief but was plaintiff's expert at trial. In essence, by making his article a part of the record, he is offering to the Court as secondary source authority his comment on his own testimony at trial, as well as his view of defendants' case. The evidence contained in the appendix is clearly factual and evidential. As such, its inclusion amounts to a circumvention of the requirements of R.1:5-5.

Accordingly, we have disregarded so much of the material in the appendix to the Attorney General's amicus brief as was not part of the

record below, as well as all references to that material contained within the body of the brief. To that extent the motion is granted.

VI

The judgment of the trial court is reversed. The cause is remanded to the Chancery Division for entry there of judgment in favor of defendants. No costs.

REPORTED AT 89 N.J. 306.

IN THE SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, MONMOUTH COUNTY WAYNE C. POMANOWSKI, PLAINTIFF, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERED BY THOMAS L. YACCARINO, J. S. C.

This case addresses the question of whether the requirement that a real estate broker join local, state and national realtor boards before he may have access to a multiple listing service violates the New Jersey Antitrust Act, N.J.S.A. 56:9-1 et seq. On a motion for summary judgment this court, applying the rule of reason analysis, determined that such a restriction does create an unlawful restraint of trade, 152 N.J. Super. 100. On appeal, the Appellate Division agreed that the rule of reason analysis was appropriate but reversed and remanded for detailed findings of act. 166 N.J. Super. 269. A lengthy hearing was held, at which

time the court made the following findings.

(1) Our antitrust law, as modeled after the Sherman Act, prohibits "(e)very contract, combination . . . or conspiracy in restraint of trade or commerce." N.J.S.A. 56:9-3. Not all restraints, however, are illegal. It is only those contracts which unreasonably restrain trade that are prohibited. Finlay & Assoc. Inc. v. Borg-Warner Corp., 146 N.J. Super. 210 (Law Div.), aff'd 155 N.J. Super. 331 (App. Div. 1976). In applying the "rule of reason" analysis to determine which contracts or combinations are unduly restrictive, a court must "focu(s) directly on the challenged restraint's impact on competitive conditions." Nat'l. Society of Professional Engineers v. U. S., 435 U.S. 679, 98 S. Ct. 1355, 1363, 55 L. Ed. 2d 637 (1978). Such a study involves an evaluation of the facts peculiar to the business, the history of the restraint and the reasons why it was imposed. Id. at 1365. The end product is "to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Id (emphasis supplied).

Significant to such a determination is the percentage of business controlled, compared to the strength of the reamining competition. U. S. v. Columbia Steel Co., 334 U.S. 495, 527, 68 S. Ct. 1107, 92 L. Ed. 1533 (1948). The impact of the Monmouth County Multiple Listing Service (MCMLS) on the real estate business in Monmouth County, whether viewed statistically or in light of the realities of the marketplace, is substantial.

The need for a multiple listing service (MLS) is twofold. The numerous listings provided through the MCMLS are important to buyers as a means of providing a wide range of selection. Similarly, most sellers prefer the increased market available to them through MLS. Consequently, when plaintiff terminated his membership with the Monmouth County Board of Realtors (MCBR) and thereby lost access to the MLS, which is provided by the Board to its members, his sales staff left him, since his own small business with its insignificant number of listings could not compete with the advantages of an office with access to MLS. See Oates v. East Bergen Cty. Multiple Listing Serv., 113 N.J. Super. 371, 380-82 (Ch. Div. 1971);

Grillo v. Bd. of Realtors of Plainfield, 91 N.J. Super. 202, 220-21 (Ch. Div. 1966).

(2) Before discussing the impact of the MCMLS in terms of volume, it is necessary to determine the relevant marketplace. See Marin County Bd. of Realtors, Inc. v. Palsson, 16 Cal. 2d 930 130 Cal. Rptr. 1, 549 P. 2d 833 (Sup. Ct. 1976). On this question, the court is of the opinion that the study be limited to Monmouth County, excluding those nine municipalities which comprise the Southern Monmouth County Board of Realtors. See United States v. Tracinda Investment Corp., 477 F. Supp. 1093 (C. D. Calif. 1979). The Southern Monmouth County Board has its own MLS and defendants offered no proof to indicate that this area had any impact on the MCBR's territory. Besides the fact that the MCBR's jurisdictional territory is limited to the county, it was clearly established that at least 85% of the listings processed by the MCMLS come from the MCBR territory. This finding is supported by the plaintiff's study of his listings available on a given date. For January 22, 1980, of 2,427 listings in the book, 2077 of those listings were in the MCBR jurisdictional territory.

Furthermore, a study conducted by William Trombetta of the Anti-trust Section of the State Division of Criminal Justice indicated that for a two-month period covering November and December 1975, only 6% to 8% of the listings were from outside the jurisdictional territory.

The court is further of the opinion that the relevant market place must be restricted to residential sales. See Marin Cty. Bd. of Realtors v. Palsson, supra. Trombetta, qualified as a marketing expert, testified that, from a marketing standpoint, residential and commercial markets are of interest to different segments of the public with different needs. In addition, in reviewing the MLS Activity Report for 1978, it appears that residential listings comprised approximately 90% of the listings. Moreover, 97% of those listings resulted in closed sales of residential property.

In light of the foregoing, the court has determined that through MLS, the MCBR controls at least 50% of the residential real estate business of the County. Defendants had stipulated to having processed 25% and 29% of all sales for the fisal years 1978 through 1979 and 1977 through 1978.

However, these figures include commercial property, farms and vacant property which should be excluded, since, as noted above, the relevant market is residential sales. By excluding the nonresidential categories of sales, the percentage is higher since the total number of relevant sales is less than as calculated by defendants. Defendants also, in this court's opinion, wrongfully excluded intra-office sales. While such property was sold by the listing broker, it was nevertheless multiple-listed and, as such, available to other brokers. It is the fact of listing and sale of residential property through MLS that is relevant to this court.

Returning to plaintiff's figures, for the calendar year 1977 there was a total of $319 million sales volume of residential property in Monmouth County. Of this sum $233 million of sales were processed through MLS, showing 70% of the business going through MLS. This percentage was lessened, however, when the dollar value of nonusables in categories where brokers may participate was added to the total sum of residential sales. The figure was further lessened by factoring out 10% to 15% to allow for out-of-jurisdiction sales. The

lowest figure, however, was 50% of all sales.

The 1978 Monmouth County telephone book "Yellow Pages" were also used to conduct an analysis of the number of real estate brokerage firms that were Monmouth County MLS members. Specialists in rentals, condominiums, development companies and independent brokers (so stated in the Yellow Pages) were immediately removed. Out of a total of 260 brokerage firms, 40 were immediately removed, leaving 220 firms as the relevant market base according to the Yellow Pages.

The remaining firms were identified as members in the MCMLS from information obtained in the Bluebook of the Monmouth County Board of Realtors, and in the listing as an MCMLS member in the Yellow Pages. This resulted in a total of 172 MCMLS members.

The remaining 48 brokerage firms were then called. Sixteen firms were then eliminated from the 48 firms. These were firms which were not active, could not be contacted, or who were not residential real estate firms. Eighteen of the remaining listings called were not MCMLS

members. The remaining 14 firms called were MCMLS members. Therefore, the 220 Yellow Page listings for Monmouth County were broken down accordingly:

Total: 220	Eliminated	MCMLS Member
Bluebook		172
Called: 48	34	14
		186

Market Share: $\frac{186}{220} = 84\%$

Finally, plaintiff testified that he used the roster of MCMLS participants, provided by the defendants in discovery, to determine the number of brokerage agencies and salespersons participating in the MCMLS. This count by plaintiff indicates that there were 228 real estate brokerage agencies/brokers and 1,664 real estate salespersons participating in the MCMLS. Therefore, on one hand, the listings obtained by plaintiff are disseminated to almost 1,900 brokers and salespersons rather than to plaintiff and his three salesperson, and, on the other hand, plaintiff and his sales staff have access to listings produced by almost 1,900 real estate brokers and salesperson.

(3) Under a "rule of reason" analysis, consideration must also be given to the possible justifications for the practices. Bd. of Trade of Chicago v. U.S., 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918). In this regard, defendants urge that the nonaccess rule is justified by the nexus existing between the MCBR and the MLS.

Primarily, defendants referred to the integration of activities between the Board and MLS. For example, it was testified that Board members volunteer countless hours to the MLS committee, and that the Board's arbitration and grievance services provide mediation between MLS participants and aggrieved members of the public. In addition, it was shown that the state and national realtor organizations provide educational benefits in connection with MLS. While there is undoubtedly some interrelationship between the various committees of the MCBR, this court is not convinced that it is substantial or that it outweighs the impact of the nonaccess rule.

The court would first refer to the history of the concept of a multiple listing

service. Robert F. Ferguson, executive vice president of the New Jersey Association of Realtors, testified to the reluctance on the part of local boards initially to accept multiple listing. It was only after numerous campaigns were waged stressing the benefits of such a service that it became popular. As such, the court is not convinced that, as defendants have urged, the MCBR will lose its raison d'etre if the Board must upen the MLS to non-realtors, or the MLS becomes independent.

Secondly, the court would point out that the testimony of Harry J. Gerlach, a realtor and executive officer of the MLS of Northern New Jersey, demonstrated that an independent MLS can function efficiently although it is not a part of a realtor organization. Any grievances may be addressed to the State Real Estate Commission. Moreover, the independent organization is totally self-supporting, thus obviating the need for volunteers from outside those participating in the service. Finally, in Gerlach's opinion the realtor membership and information which he gained as a realtor had no effect on management of his MLS.

Furthermore, plaintiff has posited that defendants have less onerous means available to promote their benefits. In United States v. Third National Bank in Nashville, 390 U.S. 171, 88 S. Ct. 882, 19 L. Ed. 2d 1015 (1968), the court stressed that the proponents of a bank merger bore the burden of establishing that the benefits expected could not be obtained by an alternate means. In a similar vein, this court finds that an independent MLS would be free to develop its own committees on arbitration, education or affirmative action. Moreover, the court is not convinced that if MLS were separate from the MCBR, the Board would necessarily lose its members. Indeed, such a position would indicate that MLS is nothing more than a drawing card for the Board, thus questioning further the reasons why the Board wishes to allow access to MLS to only MCBR members.

Giving due regard to the court's opinion in State of Iowa, ex rel. Miller v. Cedar Rapids Real Est. Bd., 1979 Tr. Cas. 63,102 at 77,043 (D.C. Iowa 1979), that the dependence of the MLS on the local board justified the nonaccess rule, this court is simply not convinced that multiple listing

in Monmouth County will cease unless it is part of the MCBR.

Defendants also argued that the Code of Ethics which controls members of the MCBR and the numerous educational programs provided by both the local and national boards benefit those consumers who purchase through MLS. The court in Marin Cty. Bd. of Realtors v. Palsson, supra, rejected this justification, noting that the Board had failed to show any increase in professional or ethical competence, 549 P. 2d at 845. Similarly, this court finds that defendants have no data to support their contention that a number of the public readily associates the realtor and MLS trademarks with "knowledgeable, efficient and honest handling of real estate transaction." Rather, empirical studies of consumer complaints conducted by the Attorney General's office indicated that at a minimum, no discernable difference existed in the reliability of a Realtor as opposed to a broker who was not a realtor.

Defendants have also attempted to make much of the fact that plaintiff voluntarily withdrew his membership in the MCBR. They refer to Maryland decision in Grempler v.

Multiple Listing Bur. of Harford Cty., Inc., 258 Md. 419, 266 A. 2d 1 (Ct. App. 1970), wherein the court upheld the Bureau's requirement that an applicant maintain an office in the county in order to gain access to the local MLS. This case is distinguishable, however, since the court specifically noted that not only had plaintiff failed to support her contention that the Bureau amounted to a monopoly, but also that of the 72 licensed brokers in Harford County, 58 were members of the real estate board, while only 12 were associated with the multiple listing bureau. 266 A. 2d at 6. Thus, the significance of access to a multiple listing service appeared to the court in Grempler to be minimal.

Barrows v. Grand Rapids Real Est. Bd., 51 Mich. App. 75, 214 N.W. 2d 532 (App. Ct. 1974), also appears to be inapplicable to the case at bar. There, too, Board membership was required before a broker could obtain access to multiple listing. In upholding the requirement, the court noted the interrelationship between the Board and the MLS. However, the court also went on to note that the testimony established the ability of nonrealtor brokers to

successfully compete with members of the Board and also that the MLS made substantially less than 50% of the real estate sales in the area and that a substantial number of realtors are not members of the local board. 214 N.W.2d at 540. Based on the findings previously discussed, the impact of MLS in Monmouth County is certainly greater, and, in this court's opinion, requires more of justification than the various interrelationships noted above.

While the decision of Collins v. Main Line Brand of Realtors, 452 Pa. 342, 304, A.2d 493 (Sup. Ct.), cert. den. 414 U.S. 979, 94 S. Ct. 291, 38 L.Ed.2d 223 (1973), is also distinguishable in that plaintiff was denied access as opposed to voluntarily withdrawing from the Board, the court nevertheless acknowledged that the relevant test for an anti-trust vilation is whether or not a broker without access to multiple listing can successfully compete with those who do have access. 304 A.2d at 496. The voluntariness of plaintiff's action, therefore, is not controlling.

(4) It is the considered opinion of the court that the MCBR through the MLS,

controls a substantial segment of the real estate market in Monmouth County. To deny plaintiff, a non-realtor, access to that MLS has the effect of foreclosing his ability to successfully compete in the real estate business. Moreover, the proposed justification for the rule, the amount of support given to MLS by the Board, does not outweigh the damage to plaintiff. The court, therefore, finds, based upon the evidence and applicable law, that the nonaccess rule does violate the new Jersey Antitrust Act, and judgment will be entered in favor of plaintiff.

REPORTED AT 175 N.J. Super. 212.

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION WAYNE C. POMANOWSKI, PLAINTIFF-RESPONDENT, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE, DEFENDANTS-APPELLANTS, AND NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERY BY FRITZ, P. J. A. D. Defendants appeal from summary judgment entered below in favor of plaintiff, declaring defendants guilty of an unlawful restraint of trade and fashioning appropriate injunctive relief. 152 N. J. Super. 100 (Ch. Div. 1977). The context in which this appeal arrives is sufficiently set forth in the trial court opinion. As succinctly put there, and true here, "the issue before the court is whether membership in a county board of realtors -- even where open to all licensed real estate brokers and salesmen -- may be deemed a condition precedent to participation in the board's multiple listing service without offending the New Jersey Antitrust Act, N.J.S.A. 56:9-1 et seq." 152 N. J. Super, at 103.

(1) Although we find it necessary to reverse and remand, we are not in essential disagreement with much that is said in the opinion below. We need not join in the implicit criticism there of Oates v. East Bergen Cty. Mult. List. Serv., 113 N. J. Super. 371 (Ch. Div. 1971), and Grillo v. Bd. of Realtors of Plainfield Area, 91 N. J. Super. 202 (Ch. Div. 1966), however. We observe that those cases are in any event distinguishable on their facts. In both there were restrictions on membership found to be exclusionary. Such is not the case here. Accordingly, we need neither expressly approve nor disapprove Oates and Grillo. It is enough that we agree with the trial judge that, substantially for the reasons set forth by him, the so-called "per se" rule is not applicable to the facts of this case where membership is available to all on precisely the same terms, i. e., a valid state license and the payment of dues. It is notable that plaintiff here was a member of the board and voluntarily resigned.

In these circumstances we do not find "conduct that is manifestly anticompetitive," and it is only in that setting that per se

rules of illegality are appropriate. Continental T. V. Inc. v. GTE Sylvanis Inc., 433 U.S. 36, 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).[1]

(2) At this point it is appropriate to comment that we also concur in the conclusion expressed in footnote (2) (152 N. J. Super. at 107) that, nevertheless, if defendants' activities do in fact offend the statute, defendants are not immune by virtue of N. J. S. A. 56:9-5(a); that section by its terms limits its operation to activities "not otherwise in violation of this act."

(3) Which brings us to our agreement with the trial judge that the exclusion of non-board members from the board operated multiple listing service must be examined

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1 There is an extraordinary reliance on federal case law in connection with interpretation of the New Jersey Antitrust Act (N.J. S. A. 56:9-1 et seq.), not only because of the dearth of state case law interpretation of this relatively new state legislation, but also because that statute itself mandates such effectuation "insofar as practicable, (of) a uniformity in the laws of those states which enact it." N.J.S.A. 56:9-18. See Exxon Corp. v. Wagner, 154 N. J. Super. 538, 544 (App. Div. 1977).

for reasonableness in order to determine whether it is an illegal restraint of trade. This is consistent with the so-called "rule of reason" analysis of activities such as these.

This rule of reason was articulated as long ago as Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Recognized and applied over the years, it requires the fact finder to weight "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T. V. Inc. v. GTE Sylvania Inc., Supra, 433 U.S. at 49, 97 S. Ct. 2549, 2557. A concise description of the scales upon which this weighing is to be performed is found in the frequently cited Board of Trade v. United States, 246 U. S. 231, 38 S. Ct. 242 (1918). There Mr. Justice Brandeis said, in connection with his comment that restraint of trade along could not determine illegality since restraint was the "very essence" of agreements and regulation of trade:

> * * * The true test of legality is whether the restraint imposed is such as merely

regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences * * * (246 U. S. at 238, 38 S. Ct. 242 at 244.)

It is in respect to the weighing process that we part company with the trail judge. He was content to decide the matter on affidavits and, perhaps unimportantly, not on a motion of plaintiff who ultimately prevailed and who had not made a motion for judgment, but on defendants' motion. We are concerned that in a matter where the ruling would reach far beyond the particular case, the determination has arrived predicated upon a sparse, relatively uninformative and certainly lifeless record. Jackson v. Muhlenberg Hospital, 53 N.J. 138 (1969).

(4) Further, we are not satisfied that even if this particular case were the only

one involved in the problem, the record thus produced is sufficient to result in a decision in which we might have confidence. We cannot share the certitude of the trial judge, in his response to his own inquiry as to whether that which is the subject of complaint in the case is a reasonable restraint of trade, when he opines that "(u)nder the facts of this case it clearly is not," because we are not at all certain that those facts have been sufficiently displayed. The generalized, abbreviated and, it would appear in some cases speculative findings of the trial judge do not reassure with respect to our present trepidations.

As is said in White Motor Company v. United States, 372 U.S. 253, 261, 83 S. Ct. 696, 701, 9 L. Ed. 2d 738 (1963), "That 'rule of reason' normally requires an ascertainment of the facts peculiar to the particular business." While there is a smattering of this, we feel, as the court felt in White Motor, "we know too little of the actual impact (of the restriction and of the other factors of Board of Trade v. United States, supra) to reach a conclusion on the bare bones of the documentary evidence before us." Ibid.

Consequently, we find it necessary to remand for a plenary hearing in which the foregoing principles may be applied. Needless to say, the trial judge must then construct his determination with the bricks and mortar of detailed findings of fact and conclusions of law.

In view of our determination we need not and should not consider the alleged constitutional right of nonassociation (or freedom of association) espoused by the Attorney General in his amicus curiae brief on behalf of the Antitrust Section of the Division of Criminal Justice. The issue was not raised or argued below. To the extent this alleged right may reflect policy considerations which might affect a rule of reason determination, the trial judge may choose to consider it on the remand.

Reversed and remanded. We do not retain jurisdiction.

REPORTED AT 166 N. J. SUPER. 269.

IN THE SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, WAYNE C. POMANOWSKI, PLAINTIFF, v. MONMOUTH COUNTY BOARD OF REALTORS, A NEW JERSEY CORPORATION; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; AND CHARLES DARRAH, DEFENDANTS.

THE OPINION OF THE COURT WAS DELIVERED BY YACCARINO, J.S.C. (1) The issue presented to the court by the facts of this case is one which has not been the subject of a reported decision in this jurisdiction but one which has far-reaching effects upon the real estate industry in this State as well as nationally. Simply stated, the issue before the court is whether membership in a county board of realtors -- even where open to all licensed real estate brokers and salesmen -- may be deemed a condition precedent to participation in the board's multiple listing service without offending the New Jersey Antitrust Act, N.J.S.A. 56: 9-1 et seq. As all of the named

defendants[1] have moved for summary judgment rendered thereon pursuant to R.4:67-5.

The facts of the case may be stated as follows. In contrast to the usual factual context where a plaintiff has been excluded from membership in the county board of realtors, plaintiff Wayne C. Pomanowski, a real estate broker licensed by the State of New Jersey, trading as the Thompson Agency, was a member of defendant Monmouth County Board of Realtors from about July 1972 until March 31, 1977. Plaintiff's termination of membership was voluntary and he has stated by way of affidavit that such decision was motivated by his disagreement with the philosophy and conduct of the county, state and national organizations.

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[1] Plaintiff instituted this action against all parties having even a remote connection to the cause of action. Not only were the Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service, a committee of the county board, made parties defendant, but Charles Darrah, president of the county board, the New Jersey Association of REaltors and the National Association of Realtors were joined. As complete relief can be afforded in regard to the rather abstract issue presented by considering the roles of the first two defendants, simplicity suggests that consideration of the ancillary defendants be limited.

This divergence of viewpoints obviously did not extend to the county board's multiple listing service.

But for the payment of dues and licensing by the State, there are no criteria for membership in the Monmouth County Board of Realtors. For the year 1977 the Thompson Agency was required to pay dues in the sum of $250: $170 for an active member (plaintiff) and $80 for two realtor-associates. Interestingly, the dues assessment is comprised of a membership fee for the county board and the state and national association. No one may choose to restrict membership to only the local organization.

To become a member of the Monmouth County Multiple Listing Service one need only be an active member in good standing of the Monmouth County Board of Realtors, comply with the rules and regulations of the multiple listing service which provides, among other things, for the division of commissions and specific service charges, and pay an initiation fee in the sum of $500. As in plaintiff's case, failure to pay dues to the county board (and, of course, to the state and national associations) automatically terminates eligibility to

participate in the multiple listing service. It is important to note, however, that the rules and regulations of the multiple listing service provide that the initiation fee "shall approximate the actual costs of bringing the service to the participant." Also noteworthy is the fact that not all multiple listing services require membership in the county or other realtor organization. Plaintiff has submitted to the court a survey, the accuracy of which was conceded at oral argument, of 35 multiple listing services in this State. Eight services are open to realtor members and nonmembers alike.

In sum, the plaintiff in this case is not one who has been excluded from membership in the organization which furnishes the multiple listing service. Plaintiff's allegation that the nexus between the county board of realtors and the multiple listing service, that is, the essentially nondiscriminatory exclusion of nonmembers from participation in the service, constitutes an unlawful restraint of trade rests solely upon plaintiff's decision to discontinue funding of the realtor organizations.

None of the defendants in this case has challenged the applicability of the antitrust

laws to the multiple listing service on the grounds of lack of economic necessity to plaintiff or its insubstantial effect on the relevant real estate market. Both issues find ready answer. As to the former, the advantages of participation in a multiple listing service are common knowledge and have been clearly delineated by case law. E.g., Oates v. Eastern Bergen Cty. Multiple Listing Service, 113 N.J. Super. 371. 381-82 (Ch. Div. 1971); Grillo v. Board of Realtors of Plainfield Area, 91 N.J. Super. 202, 218-19 (Ch. Div. 1966). As to the latter, it suffices to note that the Monmouth County Board of Realtors has been described as "one of the largest and most active Boards in the State of New Jersey with more than 260 Realtor members and more than 1,400 Realtor Associates." 19 N.J. Realtor 7 (April 1977). To be sure, the ability to restrain trade is apparent. (marin Cty. Bd. of Realtors, Inc. v. Palsson, 130 Cal. Rptr. 1, 549 P. 2nd 833, 842 (Sup. Ct. 1976).

Cases involving edclusion from organizations providing multiple listing services both in this State and in other

jurisdictions have taken a variety of approaches and have reached divergent results. Oates v. Eastern Bergen Cty. Multiple Listing Service, supra (severe restrictions on membership in organization providing multiple listing service held per se violation); Grillo v. Board of Realtors of Plainfield Area, supra (exclusion of nonmembers of county board from its multiple listing service contravention of rule of reason); Marin Cty. Board of Realtors, Inc. v. Palsson, supra (qualifications beyond state licensing by board offering multiple listing service held invalid under rule of reason; application of per se rule specifically rejected); Collins v. Main Line Bd. of Realtors, 452 Pa. 342, 304 A. 2d 493 (Sup. Ct. 1973) (restrictions on membership beyond state-imposed requirements held illegal per se); Barrows v. Grand Rapids Real Estate Bd., 51 Mich. App. 75 214 N. W. 2d 532 (App. Ct. 1974) (membership restrictions not invalid under rule of reason; no evidence of substantial control of market by board); Grempler v. Multiple Listing Bureau, Inc., 258 Md. 419, 266 A. 2d 1 (Ct. App. 1970) (require-

ment that applicant maintain main office in county upheld; rule of reason and right to admission into voluntary association analysis employed).

While both of the cases in this jurisdiction have found restrictions upon membership in organizations providing multiple listing services to be unlawful restraints of trade, the cases have employed divergent analyses. Grillo, supra, which was decided prior to the adoption of our state antitrust law, applied the rule of reason test although it is abundantly clear from that opinion that the court leaned heavily toward application of the per se doctrine. Oates, supra, decided under the state antitrust act, followed the per se approach. Neither case was the subject of appellate review, leaving this court of coequal jurisdiction in a relatively uncharted sea. The threshold issue of which test is to be applied is squarely raised by the parties.

(2-4) Having duly considered the matter, this court is of the opinion -- despite the holding in Oates and the court's apparent predisposition in Grillo -- that a per se analysis cannot be employed for an

alleged concerted refusal to deal of this nature. Both Oates and Grillo relied upon cases such as Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949 (1941); Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1944); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207,79 S. Ct. 705, 3 L. Ed. 2d 741 (1959), and Silver v. New York Stock Exchange, 373 U. S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963), which declared in sweeping language that group boycotts or concerted refusals to deal are per se illegal restraints of trade. Those cases are readily distinguishable, however, having as their aim the prevention of "a particular type of predatory activity." Marin Cty. Board of Realtors, Inc. v. Palsson, supra, 549 P. 2d at 840. As was noted in that case, the

> * * * limitation on the per se rule is particularly applicable to trade association agreements not directly aimed at coercing third parties and eliminating competitors. In cases involving such agreements, courts have generally applied the rule of reason test. * * * This trend, while not universal, indicates a recognition by the courts that trade associations may perform beneficial services for their members and society . . . In the course of

providing these benefits, the associations often exclude nonmembers. But such exclusion, unless directly aimed at eliminating competition, can rarely be said to be so inherently destructive or so devoid of any discernible benefit that the courts must condemn the policy without exploring its effects or the underlying rationale. (Id. at 840-41; citation and footnote omitted)

The court finds this analysis to be most persuasive; moreover, it is compelling where, as here, plaintiff was a member of the trade association and his exclusion therefrom voluntary.[2]

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[2] The court pauses to note that it disagrees with the defendants' argument that application of the per se rule is foreclosed by statute, N.J.S.A. 56:9-5(2) provides:

> This act shall not forbid the existence of trade and provessional organizations created for the purpose of mutual help, and not having capital stock, nor forbid or restrain members of such organizations from lawfully carrying out the legitimate objects thereof not otherwise in violation of this act; nor shall those organizations or members per se be illegal combinations or conspiracies in restraint of trade under the provisions of this act.

A close reading of this section demonstrates that the organization as an entity must be viewed separately from its conduct. Thus, the act exempts the organization itself while mandating that the activities of its members may not be undertaken in violation of law. Furthermore, a per se approach may not be applied to the

(5) This brings the court to the question of whether mandated membership in the Monmouth County Board of Realtors (and the state and national associations) as a condition precedent to participation in the multiple listing service is a reasonable restraint of trade. Under the facts of this case, it clearly is not. Here the payment of dues is totally unrelated to the operation of the multiple listing service. Even members are required to pay an initiation fee of $500 which sum is designed to approximate the actual cost of providing the service. It is apparent, therefore, that board membership is surplusage. Undoubtedly, dues are used for purposes believed to advance the interests of the real estate industry as a whole, as for example, the litigation fund; however, the mutual benefit concept cannot be used to coerce a person to join what is designed to be a voluntary association. Lawyers are

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organization, although the doctrine may be applied to the activities of the organization where appropriate. See Oates v. Eastern Bergen Cty. Multiple Listing Service, Inc., supra, 113 N.J. Super, at 394. To construe the statute otherwise would require detailed judicial analysis of conduct which clearly invokes the per se rule, such as price fixing, a result not envisioned by the Legislature.

not compelled to join a county bar association and, should they choose to do so, they do not have to join a state or national bar association. Here, however, real estate brokers and salesmen must become members of the county board and the state and national associations in order to participate in the multiple listing service, despite the fact that membership and the payment of dues are unrelated to actual cost.

It is apparent, moreover, that no bona fide justification may be made in support of the reasonableness of the membership requirement. The short answer is that of the 35 multiple listing services surveyed by plaintiff, eight do not condition participation upon membership. Not only have certain segments of the industry recognized that the nexus between the local board and the multiple listing service is artificial, but in exclusion cases striking down restrictions upon membership the judicial relief afforded has encompassed complete elimination of any constraints upon nonmember access to the multiple listing service. E. G., Grillo v. Board of Realtors of Plainfield Area, supra, 91 N.J.

Super, at 229; Marin Cty. Board of Realtors, Inc. v. Palsson, supra, 549 P. 2d at 845.

Against this torrent of logic defendants have understandably grasped at a straw contained in Grillo where the court opined that

> * * * (i)f every licensed real estate broker in the Plainfield area could become a member of the Board for the asking, no nonmember would have cause for complaint about being excluded from the benefits of the multiple listing service. (91 N. J. Super, at 210)

That this statement stands four-square against plaintiff's position cannot be denied. But this apparent barrier is removed when it is acknowledged that the court in Grillo went on to grant nonmembers complete access to the multiple listing service furnished by the local board. In brief, the Grillo court itself recognized that a membership requirement needs a rational basis to find sustenance. Moreover, as plaintiff's survey points out, the local board which defended in Grillo is one of eight which does not presently require membership as a condition precedent to access to the multiple listing service.

For the foregoing reasons final judgment will be entered declaring that the

by-laws, rules and regulations of the Monmouth County Board of Realtors and the Monmouth County Multiple Listing Service which limit participation in the service to members of the local board constitute an unlawful restraint of trade. The county board and its committee will be permanently enjoined from denying non-members of the board equal access to the multiple listing service.

As the foregoing declaratory and injunctive remedy affords plaintiff complete relief, the motions for summary judgment of the other named defendants will be granted. Since plaintiff waived at oral argument any claim for compensatory or punitive damages, jurisdiction will be retained solely for the purpose of determining the award of reasonable attorneys' fees and costs of suit pursuant to N.J.S.A. 56:9-10(b).

REPORTED AT 152 N. J. Super 100.

NEW JERSEY ANTITRUST ACT

N.J.S. 56:9-1 Short title

The Act may be known and shall be cited as the New Jersey Antitrust Act.

N.J.S. 56:9-2 Definitions

a. As used in this act, unless the context otherwise requires "person" shall mean any natural person or persons, or any corporation, partnership, company, trust or association of persons.

b. "Trade or commerce" shall include all economic activity involving or relating to any commodity or service.

c. "Commodity" shall mean any kind of real or personal property .

d. "Service" shall mean any activity which is performed in whole or in part for the purpose of financial gain, including but not limited to sale,

rental, leasing or licensing for use.

N.J.S. 56:9-3 Contracts and conbinations in restraint of trade

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce. in this State, shall be unlawful.

N.J.S. 56:9-12 Treble damage suit

a. Any person who shall be injured in his business or property by reason of a violation of the provisions of this act may sue therefor and shall recover threefold the damates sustained by him, together with reasonable attorney's fees, filing fees and reasonable costs of suit. Reasonable costs of suit may include, but shall not be limited to the expenses of discovery and document reproduction.

b. The State and any of its political subdivisions and public agencies shall be deemed a person within the meaning of this section. The Attorney General, on behalf of the State or any of its political subdivisions or public agencies, or the political subdivision or public agency at the direction of or with the permission of the Attorney General may institute an action to recover the damages provided for by this section or by any comparable provisions of Federal law.

N.J.S. 56:9-18 Uniform construction

This act shall be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws of those states which enact it.

SHERMAN ANTITRUST ACT

15 USC I. Restraint of trade; resale price maintenance; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: Provided, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied

to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes", approved September 26, 1914 (15 USC 45): Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between

manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c.647, 1, 26 Stat. 209; Aug 17, 1937, c.690, Title VIII, 50 Stat. 693; July 7, 1955, c.281, 69 Stat.

282; Dec. 21, 1974, P.L. 93-528, 3, 88 Stat. 1708).

15 USC 15. Suits by persons injured; recovery of treble damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, c.323 4, 38 Stat. 731)

Plaintiff	
WAYNE C. POMANOWSKI	SUPERIOR COU OF NEW JERSE
	CHANCERY DIVI MONMOUTH COUN
vs.	
Defendants	DOCKET NO.
MONMOUTH COUNTY BOARD OF REALTORS, A New Jersey Corporation; MONMOUTH COUNTY MULTIPLE LISTING SERVICE; NEW JERSEY ASSOCIATION OF REALTORS; NATIONAL ASSOCIATION OF REALTORS; WILLIAM G. KIRCHER; and CHARLES DARRAH	C3479 76 CIVIL ACTION AFFIDAVIT

STATE OF NEW JERSEY)
COUNTY OF MONMOUTH) ss:

WAYNE C. POMANOWSKI, being of full age and duly sworn according to law upon his oath deposes and says:

1. I am the plaintiff in the above-captioned matter and reside at Apartment 102D, White Street, Eatontown, Monmouth County, New Jersey.

2. I am a licensed real estate broker of the State of New Jersey and practice as such as the Thompson Agency, with offices at 43 Gilbert Street, North Tinton Falls, Monmouth County, New Jersey.

3. I had been a member of the Monmouth County Board of Realtors from approximately July of 1972 to March 31, 1977, at which time I did not renew my membership because I no longer wished to be a member of that organization.

4. I have been a member and participant in the Monmouth County Multiple Listing Service since approximately July of 1972 and had paid my membership fees up to December 31, 1977.

5. On April 1, 1977, I noticed that no listings were delivered to me by the Monmouth County Multiple Listing Service.

6. At approximately 1:30 p.m. on April 1, 1977, I visited the office of Monmouth County Multiple Listing Service to inquire as to why I had not received any listings on that day. No one at the office would give me an answer and referred me to Mr. William Kircher, who was the Executive Officer of the Multiple Listing Service.

7. Mr. Kircher informed me that as of April 1, 1977, I was no longer a member of the Monmouth County Multiple Listing Service because I was no longer a mem

of the Monmouth County Board of Realtors. He further advised me that my membership in both organizations was terminated on March 31, 1977 because I did not pay my dues to the Monmouth County Board of Realtors, even though my dues were paid in full for the Monmouth County Multiple Listing Service. Mr. Kircher also advised me that I would not be allowed to receive listings from the Monmouth County Multiple Listing Service for the above reason.

8. When I protested to Mr. Kircher of this decision, he placed a phone call to Mr. Charles Darrah, President of the Monmouth County Board of Realtors, who confirmed Mr. Kircher's decision that I could not receive listings from the Monmouth County Multiple Listing Service because I was not a member of the Monmouth County Board of Realtors.

9. I am currently being forced out of the real estate business because I have no inventory available because I no longer receive listings. I am unable to adequately service my clients because I am being denied vital real estate information which is needed to allow me to

complete my appraisal of values of real estate.

10. I have found it necessary to take out a $5,000.00 loan to finance my real estate office. This loan is rapidly being exhausted and I may be forced to close my real estate agency within the near future unless I receive relief from the Court.

11. I am presently being forced out of the real estate business because I decided not to be a member of a trade organization.

12. There is no other source for listings of available real estate in the area of Monmouth County in which I do business, except for the Monmouth County Multiple Listing Service.

13. It is my belief that a major portion of the real estate brokers in the Monmouth County area are members of the Monmouth County Board of Realtors and members of the Monmouth County Multiple Listing Service.

14. I make this affidavit in support of the Verified Complaint and Order to Show Cause with Temporary Restraints.

/s/ Wayne C. Pomanowski
WAYNE C. POMANOWSKI